(3)

No. 99-698

Supreme Court, U.S.
DEC 29
CLERK

IN THE

Supreme Court of the United States

CATHERINE L. HOY, Guardian for KEVIN A. BROWN,

Petitioner,

v.

STEVE A. SIMPSON, SHERIFF OF LOUDOUN COUNTY; DANIEL DONDERO; TRULA PEACH; LANCE SCHUL; JAMES DRUMMOND; SHANNON M. DALY; THE LOUDOUN COUNTY BOARD OF SUPERVISORS; MICHAEL COX; JACK BRADLEY; JEFFREY FRAGALA; Unknown Sheriff's Deputies,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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One searches Respondents' Brief in Opposition in vain to find much that actually addresses the questions presented for review in the Petition: (1) whether *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) ["*Heller*"], was correctly applied here; and (2) whether the issue of qualified immunity should be submitted to a jury. Petitioner submits that Respondents have missed the point of the Petition: to resolve the split of authority among the Courts of Appeals on these two important civil rights issues and to achieve a measure of justice for Petitioner through a full trial of all of her claims on remand.

I. BECAUSE OF THE ELEMENT OF SUBJECTIVE INTENT FOR LINE OFFICERS IN DELIBERATE INDIFFERENCE CIVIL RIGHTS CLAIMS, *CITY OF LOS ANGELES v. HELLER* SHOULD NOT BAR APPELLATE REVIEW OF DISMISSAL OF *MONELL/CANTON* POLICY AND FAILURE TO TRAIN CLAIMS AGAINST SUPERVISORS AND MUNICIPALITIES.

In this case, the appeal of the District Court's dismissal of the supervisory policy and training claims under *Monell/Canton*[1] regarding the handling of intoxicated inmates was never decided on the merits because the Fourth Circuit ruled that *Heller* precluded such review, "even if Appellant *could* establish that the County was deliberately indifferent under *Canton v. Harris*." (Appendix at 23a; emphasis in original).

Respondents' lengthy (and often intemperate) exegesis notwithstanding, Petitioner is confident that she would have prevailed in reversing the dismissal had the point been reached, given: (1) the surfeit of evidence supporting

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1. *Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Canton v. Harris*, 489 U.S. 378 (1989).

Respondents' policy and training defects regarding intoxicated inmates (including the defendant sheriff's own admissions); and (2) her entitlement to have the evidence and all reasonable inferences therefrom viewed in the light most favorable to her before her supervisory claims can be taken from the jury.[2] The test is not whether the plaintiff's prospects for recovery are remote or unlikely nor whether she will ultimately prevail. Rather, the issue is whether the claimant is entitled to offer evidence to support her claim. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1973).[3]

In this regard, the Fourth Circuit certainly did not find the trial evidence on the issues actually allowed to be litigated to be as one-sided as Respondents stridently maintain:

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2. These principles, which Respondents ignore in reciting their version of the facts and expert testimony as if they had won a *verdict* on the policy and training claims instead of a dismissal, are a venerable foundation of the right to trial by jury guaranteed by the Seventh Amendment. A case must proceed to trial "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-6 (1957); *see also Hughes v. Rowe*, 449 U.S. 5, 10 (1980); *Miree v. DeKalb Co.*, 433 U.S. 25, 27 n.2 (1977); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Cruz v. Beto*, 405 U.S. 319, 322 (1972); *Haines v. Kerner*, 404 U.S. 519, 520-1 (1972).

3. In this respect, Respondents' *ad hominem* attacks on Petitioner and her counsel — *see, e.g.*, "purposefully misleading" [Opp. Brief at 7]; "egregious misstatement of fact" [Opp. Brief at 9]; "outrageously mischaracterized" [Opp. Brief at 13] — are not only inaccurate themselves but quite inappropriate. Petitioner has presented the facts in the light most favorable to her, as she is entitled to do when her claim at issue was dismissed pursuant to Fed. R. Civ. P. 12(b)(6). There has been no attempt to mislead the Court. *Respondents* are the only parties in this case found by the District Court to have engaged in fraud — a finding that they did not appeal. Appendix at 29a-30a.

> Brown's exact condition at the time of his booking and throughout this [twenty-two hour] period was a matter of some dispute at trial, but there is no doubt that he was highly intoxicated and spent most, if not all, of that time either asleep or unconscious.

Appendix at 4a.

Indeed, the Fourth Circuit's affirmance of the District Court's dismissal of the policy and training claims was not based on the evidence, as Respondents urge here. The Court of Appeals noted, albeit in *dicta*, that it was "dubious that such a determination could legitimately be made as a matter of law from the four corners of the complaint." Appendix at 23a. Instead, the Fourth Circuit believed that its reviewing authority on the merits was circumscribed by *Heller*. Other Courts of Appeals have ruled similarly, thus creating the split of appellate authority.

Although Respondents declare that the cases cited by Petitioner as constituting the "Circuit-split" on the application of *Heller* are "fact-bound and easily reconciled" [Opp. Brief at 20], they make no attempt to show this. They also offer no response to Petitioner's argument that the Courts of Appeals are in disarray as to whether *Heller* should apply at all when, as here, the constitutional tort at issue has a subjective intent element, such that the individual officers' liability could be negated by what they did not know (and therefore failed subjectively to intend). That such lack of subjective intent could result from ignorance due to lack of training separates *Heller* from the *objective* constitutional tort cases where it had its genesis.

Heller was a police excessive force case. At that time, the lower courts were evaluating such claims under both the substantive "due process" clause of the Fourteenth Amendment

and under the "unreasonable seizure" clause of the Fourth Amendment. The proper test, unresolved in *Heller*, was addressed by the Court three years later in *Graham v. Connor*, 490 U.S. 386 (1989), wherein the Court grounded excessive force claims solely in the Fourth Amendment and applied an objective standard:

> Whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation . . . [such that] [a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.

Id. at 397 (citations omitted). By contrast, an Eighth Amendment claim for deliberate indifference, such as Petitioner's, "puts in issue the subjective motivations of the individual officers," which has "no bearing . . . under the Fourth Amendment." *Id.*:

> Differing standards under the Fourth and Eighth Amendments are hardly surprising: the terms "cruel" and "punishments" clearly suggest some inquiry into subjective state of mind, whereas the term "unreasonable" does not.

Id. at 398.

Petitioner submits that the Fourth Circuit here, like some other Courts of Appeals that have applied *Heller* to subjective intent constitutional torts, has acted too broadly. Respectfully, these Courts of Appeals have failed to recognize the distinction between objective intent constitutional torts, where (to use *Heller's* phrase) the vindication of the officers means "in fact"

that no constitutional tort occurred, since the officers' subjective intent was irrelevant; and subjective intent constitutional torts, where absence of subjective intent through lack of training can provide a complete defense without saying anything about whether "in fact" a constitutional tort occurred.

In an objective intent constitutional tort, such as excessive force, a finding objectively that there was no police misconduct truly renders the officers' training irrelevant, even if deficient. Colloquially put, the supervisors and county "get a pass" for being lucky on that occasion. In a deliberate indifference case, however, medical care could be denied but the officers could be exonerated because they were not trained to recognize a predictable risk, and thus subjectively, meant no harm.[4]

The extension of *Heller* to subjective constitutional torts is particularly pernicious when defendants obtain bifurcation of the *Monell/Canton* claims such that a verdict for the untrained line officers who unknowingly failed to perform their duties prevents the supervisory claims from ever being heard.[5] Here,

4. Respondents' argument that an alleged lack of similar prior incidents precludes Petitioner's *Monell/Canton* claim was also presented to the Court of Appeals, but the Fourth Circuit did not rely upon it. In any event, the point of a "prior incidents" argument is to show that the supervisory defendants had notice of the need to correct policy and training, which existed here because Virginia regulatory authorities called the county's training deficiencies to its attention repeatedly prior to the injury to Kevin Brown. Moreover, "evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious risk for such a violation could trigger" liability. *Board of County Commissioners v. Brown*, __ U.S. __, 117 S. Ct. 1382, 1385 (1997), *quoting Canton v. Harris*, 489 U.S. 373, 388 (1989).

5. Respondents thus misunderstand the bifurcation issue, when they present it as a separation of liability and damages. [Opp. Brief (Cont'd)

as found by the District Court, Respondents obtained such bifurcation at trial by fraudulently withholding evidence of supervisory liability. That the Court of Appeals would rely on *Heller* to affirm the dismissal of these claims only adds salt to the wound.

The unleashing of *Heller* from its original mooring by some appellate courts has allowed it to drift into areas of constitutional law where it has no logical basis, including its extreme application here. The Court should set the matter right.

II. QUALIFIED IMMUNITY SHOULD NOT BE A JURY QUESTION.

Respondents also ignore the split of appellate authority on whether a District Court should instruct juries on qualified immunity. This issue was implicit last term in *Snyder v. Trepagnier*, __ U.S. __, 119 S. Ct. 863 (1999), where the Court granted certiorari in a Louisiana case to resolve the conundrum in which a jury, using a special verdict form, found that police used excessive force but were also entitled to qualified immunity — both issues involving an objective analysis of police conduct under the law and facts at the time and illustrating the problem of giving the qualified immunity question to a jury. As noted, this case settled after issuance of the writ but before it was heard by the Court. The "Circuit-split" on instructing on qualified immunity remains, however.

Respondents' argument that qualified immunity is irrelevant because it was not emphasized before the jury [Opp. Brief at 22] ignores the basic thrust of their defense (that the deputies did the best they could under the circumstances and meant no harm) and the rule that juries are *presumed* to act

(Cont'd)

at 20]. It is the severance of the untrained defendants from those defendants responsible for the training that creates the mischief of which Petitioner complains.

in accordance with their instructions. *Heller*, 475 U.S. at 798. Because special interrogatories on the defenses of subjective intent and qualified immunity were not submitted to the jury, it is impossible to determine on appeal whether the jury's finding for the line officers was based on the merits of Petitioner's claims or on one or more of Respondents defenses.[6]

In short, the District Court should not have instructed on this issue, and its presentation to the jury merely added to the error of removing the sheriff and the county from the case. It unfairly increased the likelihood of a defense verdict for the line officers that had nothing to do with the merits of whether Kevin Brown was illegally denied proper medical care, and the instruction without a special verdict form precluded proper appellate review. The Court should resolve the conflict in the Courts of Appeals on this question by holding that judges, not juries, should decide qualified immunity.

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6. Respondents' assertion that the verdict forms *were* special interrogatories [Opp. Brief at 22] is incorrect. The forms merely separated the causes of action, not the defenses. [Appendix at 55a, *et seq.*]. Respondents' suggestion that this point was not preserved by timely objection is also inaccurate. Objection was made. Moreover, the Court of Appeals found that Petitioner did the best she could to preserve her objections to the qualified immunity charge in light of the District Court's "vague statements" about its intended instructions and a charging conference that fell "considerably short of the mandatory requirements" of F.R.C.P. 51. [Appendix at 20a-22a].

CONCLUSION

The essential question in this case is not whether the untrained deputies did their best to summon help once Kevin Brown's condition became an obvious emergency even to the untrained. The issue, which the jury never heard, is whether proper policies and training would have prevented Mr. Brown from *becoming* an emergency through timely medical intervention in a situation that is repeated daily in our nation's jails. The legal issues on which certiorari is sought exist on a very human landscape of helpless and often desperately ill people, who, whatever their offenses, are entitled under our laws and this Court's decisions to basic dignity in custody, to medical treatment, and to a day in court.

Respectfully submitted,

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